

Respondent argues the claimant had abandoned his job when he quit driving and went to sleep. Respondent further argues claimant violated a specific prohibition against allowing an unauthorized non-employee to drive the vehicle. Accordingly, respondent requests the Board to affirm the ALJ's Order.

At issue is whether, at the time of accidental injury, the claimant was performing work which had been forbidden or was performing his work in a forbidden manner.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

At the preliminary hearing the parties gave an agreed recitation of the facts. The claimant worked for the respondent doing cleaning and floor buffing work for respondent's clients which required traveling to the different facilities after normal working hours when the buildings were closed. The claimant had finished a job in Rose Hill, Kansas, and was traveling to Medicine Lodge, Kansas, in the early morning hours on November 19, 2005. The claimant was in the respondent's vehicle which had been assigned to him. He became sleepy and let an unauthorized passenger drive. While claimant slept the vehicle left the roadway, rolled and flipped. Claimant suffered significant neck and back injuries. The driver was cited for driving while his license was suspended.

Dana Moody, respondent's office/human resource manager, testified the claimant began working for the respondent on January 28, 2002, and that he was told when hired that company policy prohibited persons not authorized or employed by respondent to operate or ride in company vehicles. Because claimant was hired to replace an employee who had wrecked a company vehicle with a non-employee passenger, the policy was emphasized and verbally explained to claimant. Moreover, claimant signed a commitment sheet agreeing he was provided a policy manual. Included in the manual was a page devoted to the use of company vehicles which again specifically prohibited persons not authorized or employed by respondent from operating or riding in company vehicles.

Ms. Moody further recounted an episode where it was discovered claimant had allowed a former employee, his cousin, to accompany him in the company vehicle. Claimant was told not to let the former employee ride in the vehicle. But no further disciplinary action was taken against claimant. Finally, Ms. Moody testified claimant is paid by the hour and is compensated for the time spent cleaning as well as the time spent driving to each job location.

In 2 *Larson's Workers' Compensation Law*, Chapter 33, it is stated:

When misconduct involves a prohibited overstepping of the boundaries defining the *ultimate work* to be done by the claimant, the prohibited act is outside the course of employment. But when misconduct involves a violation of regulations or prohibitions relating to the *method* of accomplishing that ultimate work, the act remains within the course of employment.

Kansas law recognizes the distinction and has adopted the general rule that if an employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment.¹ Conversely, it is equally recognized that if work is performed in a forbidden manner an employee is still acting in the course of his employment.²

The distinction between performing work which has been forbidden and doing work in a forbidden manner is demonstrated in 2 *Larson's Workers' Compensation Law*, § 33.02[5] in the following manner:

If the claimant's job is to remove stones, but the claimant is forbidden to use a tractor, removing stones with a tractor is still removing stones and an injury from the tipping of the tractor is compensable.

Here, permitting an unauthorized passenger to drive was forbidden. But the act of traveling in the vehicle to the next job site was part of claimant's job and was not prohibited or forbidden. Consequently, claimant was performing an assigned task in a forbidden manner. The Board concludes claimant's accident arose out of and in the course of his employment with respondent.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated March 17, 2006, is reversed as claimant did suffer accidental injury arising out of and in the course of his employment. This matter is remanded to the Administrative Law Judge for additional proceedings, if necessary, consistent with the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of June 2006.

BOARD MEMBER

c: Gary K. Albin, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹ *Hoover v. Ehram Company*, 218 Kan. 662, Syl. ¶2, 544 P.2d 1366 (1976).

² *Servantez v. Shelton*, 32 Kan. App. 2d 305, 81 P.3d 1263 (2004).